AUG 30 1950
CHARLES ELMORE CROPLE
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In The Supreme Court of The United States
October Term, 1950
No. 283

J. L. GENTRY,

Petitioner,

vs.

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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In The Supreme Court of The United States October Term, 1950 No._____

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vs.

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The petitioner, J. L. Gentry, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled cause on May 26, 1950.

Opinion Below

The opinion of the Supreme Court of Florida is reported in 46 So. 2d 485.

Jurisdiction

The judgment of the Supreme Court of Florida was entered on May 26, 1950. The opinion of the Supreme Court of Florida was amended and rehearing was denied on June 16, 1950. (R. 67). The jurisdiction of this court is invoked under 28 U.S. Code, Section 1257(3).

The action was brought, tried and decided under the Federal Employers' Liability Act, 45 U.S. Code, Sections 51 et seq. Petitioner's initial pleading alleged facts bringing the case within the Federal Act. (R. 1). The respondent conceded (see its motion for directed verdict, R. 44 et seq.) and both Courts below recognized that the Federal Act applied. (See the trial court's charge to the jury, R. 53, and the first sentence of the opinion of the Supreme Court of Florida. R. 61).

Question Presented

Whether the allegations and proof of respondent's negligence in failing to provide petitioner a reasonably safe place in which to perform his duties as flagman were sufficient to support the jury's verdict for petitioner.

Statute Involved

The pertinent provisions of the Federal Employers' Liability Act, under which the action was brought and tried, are printed in Appendix "A", *infra.*

Statement

The Petitioner, J. L. Gentry, sued and recovered judgment under the Federal Employers' Liability Act for injuries

sustained by him while acting as flagman upon one of the respondent's freight trains on a run from Jacksonville, Florida to Lake Wales, Florida.

After formal allegations to bring the case within the Federal Act the declaration alleged:

> "At or about 1:15 P.M. on January 23, 1947, the plaintiff was acting as flagman on defendant's through freight train No. 87 consisting of about 80 cars on a run from Jacksonville, Florida to Lake Wales, Florida. As said train was leaving a side-track at Bryan, Florida and going onto the defendant's main line track it became and was the duty of the plaintiff to close and lock the switch at the intersection of said tracks after the last car of said train passed over said switch and in such movement it was usual and customary for the train to continue moving after passing through the switch and for the flagman to drop off the caboose, close and lock the switch and run after and board the caboose while the train continued moving and it became and was the duty of defendant to furnish plaintiff a reasonably safe place to perform the duties of his employment notwithstanding which the defendant negligently failed to provide plaintiff a reasonably safe place in which to perform his said duties in this to-wit: that the ground along which plaintiff was obliged to run to overtake and board said caboose was approximately 30 inches below the level of the track so that it was necessary in boarding the caboose to step upon the ballast upon which the track was constructed and at that place the ballast was coarse and loose and insecurely packed and did not afford plaintiff a secure footing for boarding the said caboose and at the time and

> place aforesaid the plaintiff dropped off the rear of his said train at or near the said switch, closed and locked the same while the train continued moving and thereupon plaintiff ran to overtake and board his caboose in the usual and customary manner above described and while attempting to catch and swing onto the caboose, the said rock ballast slipped and gave way under the plaintiff's feet throwing the plaintiff to the ground and thereby the plaintiff was cut, bruised and injured. . . . ." (R. 1, 2).

Respondent's only attack upon the declaration was by general demurrer (R. 2), which was overruled (R. 3).

The only testimony introduced upon the issue of liability was that of plaintiff himself (R. 31-39) and that of his conductor, Mr. Daugherty. (R. 5-30). Their uncontradicted testimony established that Gentry got off the caboose to close and lock the switch while his train continued moving. (R. 8). This was usual and customary. (R. 8, 9). In attempting to overtake and board the moving train, Gentry ran along the berm which was about 30 inches below the level of the tracks. (R. 9, 10, 33). The step of the caboose, which he was attempting to board, was 22 to 24 inches above the top of the rail. (R. 34). The ballast over which he was obliged to run measured 53 inches from the berm to the head of the tie. (R. 10). The ballast "dropped off" at an angle of about 30 degrees. (R. 26, 34), Gentry testified:

> "It is impossible to stand on the berm of the road and catch on the step . . . . you can hardly reach the step, let alone the grab iron." (R. 34).

> "After I lined the switch, I had to run to catch the

> caboose; and in running, as I run up the edge of this, on the side of this ballast, to catch hold of the grab iron to swing on the caboose this ballast rolled under my feet and throwed me to the well, it throwed me right in that ballast bed". (R. 32).

The respondent railroad company offered no testimony, relying instead upon its contentions asserted by motion for directed verdict (R. 47 et seq.) that no negligence was alleged or proved.

The jury returned a verdict for the plaintiff upon which judgment was entered by the trial court. (R. 56).

The Supreme Court of Florida reversed the judgment with directions to the trial court to enter final judgment for the defendant. (R. 61-64). It held that the allegations of the declaration and the evidence were not sufficient to charge or prove negligence on the part of the railroad company, saying, among other things:

> "Since there is no charge that the train was negligently operated, the point here is whether or not the ballast supporting the road was properly placed and preserved. This was essentially an engineering question and the courts generally trust to experts in that line for an answer to the question." (R. 62, 63).
>
> • • • • • • • • • •
>
> "It therefore necessarily follows that the plaintiff must allege and prove negligence in the maintenance of the track. We find no evidence showing that the track was negligently maintained or kept up to standard." (R. 63).

Specification of Errors to be Urged

The Supreme Court of Florida erred:

1. In holding that petitioner's declaration was not sufficient to charge the respondent with negligence.

2. In holding as a matter of law that the evidence failed to show negligence on the part of respondent.

3. In reversing the judgment entered upon the jury's verdict for petitioner and directing the trial court to enter final judgment for respondent.

Reasons for Granting the Writ

1. The importance of questions involving the construction and application of the Federal Employers' Liability Act and of correcting the frequent failure or refusal of the lower courts to follow and give effect to this court's decisions under that act has been repeatedly affirmed.[1] The particular question involved in this case is important to all carriers and employees subject to the provisions of the act. For in its broad aspects it involves the extent of the duty of the carrier to furnish, and the right of the employee to have furnished, a reasonably safe place to work i.e., whether negligence of the carrier may be found in the *required use* of a place of work for a task for which it was not designed and in circumstances that make its use for that purpose hazardous. Should the principles of the Florida Court's decision be followed and

1. (a) "It was because of the importance of preserving for litigants in F.E.L.A. cases their right to a jury trial that we granted certiorari in this case". **Wilkerson** v. **McCarthy**, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497. (b) "Our duty to review certain cases of this nature is settled." **Carter** v. **Atlanta & St. Andrews Bay Ry. Co.** 338 U.S. 430, 70 S. Ct. 226, 94 L. Ed. ———. (c) "The obvious importance of the restrictive interpretation given to the two federal Acts (F.E.L.A. and Safety Appliance) prompted us to grant certiorari." **Coray** v. **Southern Pac. Co.** 335 U.S. 520, 69 S. Ct. 275, 93 L. Ed. 208. (d) "Because important rights under the Act (F.E.L.A.) were involved we granted certiorari". **Blair** v. **Baltimore & O.R. Co.** 323 U.S. 600, 65 S. Ct. 545, 89 L. Ed. 490.

applied in all "safe place to work" cases, the employer's duty and the employee's right would be measured and determined according to whether or not the structures and equipment provided were constructed in accordance with sound engineering principles and maintained in accordance with standard maintenance practice, regardless of the required use. And the employee would be deprived, as petitioner here has been deprived, of the right, heretofore recognized, to a jury's verdict upon the question of whether or not, in all the circumstances of the occasion, the carrier exercised due care to provide him with a reasonably safe place to discharge the duties of his employment.

2. In ruling that the declaration was not sufficient to charge negligence, the Supreme Court of Florida's decision is not in accord with this court's holding in *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. ------, that the Federal rights under the Federal Employers' Liability Act "cannot be defeated by the forms of local practice" and that the sufficiency of plaintiff's pleading must be determined by whether the allegations "are sufficient to permit introduction of evidence from which a jury might infer that petitioner's injuries were due to the railroad's negligence in failing to supply a reasonably safe place in which to work".*Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 106, 107, 94 L. Ed.-------.

3. The decision of the court below is in conflict with this Court's decisions arising under the F.E.L.A. in *Bailey* v. *Central Vermont Railway*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 and *Pauly* v. *McCarthy*, 330 U.S. 802, 67 S. Ct. 962, 91 L. Ed. 1261, viz: that the question of negligence in failing to furnish a safe place to work by reason of the required use of a bridge forming part of the roadbed is for the jury. In each of those decisions this court sustained the

verdict for the plaintiff employee.

4. Not only did the court below fail to give effect to this court's decision in the *Bailey* case but *it followed the erroneous and reversed decision of the Supreme Court of Vermont* in that case (113 Vt. 8, 28 A 2d 639) to the effect that the sufficiency of the structure was essentially an engineering question upon which the jury was not competent to pass.

5. The decision of the court below is not in accord with the long line of decisions by this court establishing that such issues are for the jury in these Federal Employer Liability cases.[2]

6. Moreover the decision of the court below is clearly erroneous in the following respects:

(a) The Florida Court entirely misconceived the basis upon which the judgment was sought and recovered as is evident by the following quotation from its opinion:

> "Since there is no charge that the train was negligently operated, the point here is whether or not the ballast supporting the road was properly placed and preserved. This was essentially an engineering question and the courts generally trust to experts in that line for an answer to the question. *Bailey* v. *Central Vermont Railway,* 113

2. **Tiller** v. **Atlantic Coast Line R. Co.** 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610; 143 A.L.R. 967; **Bailey** v. **Central Vermont Ry.** 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; **Lavender** v. **Kurn,** 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916, **Wilkerson** v. **McCarthy,** 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497, **Ellis** v. **Union Pacific R. Co.,** 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572; **Brown** v. **Western Railway of Alabama,** 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. ———; **Tennant** v. **Peoria & P.U. Ry. Co.** 321 U.S. 29, 64 S Ct. 409, 88 L. Ed. 520, **Jesionowski** v. **Boston & Maine R. Co.,** 329 U.S. 452, 67 S. Ct. 401, 91 L. Ed. 416, 169 A.L.R. 947; **Anderson** v. **Atchison T. & S. F. R. Co.** 333 U.S. 821, 68 S. Ct. 854, 92 L. Ed. 1108.

Vt. 8, 28 Atl. 2d. (639), 319 U.S. 350, 352, 63 S. Ct. 1062, 87 L. Ed. 1444." (R. 65).

But the liability of the railroad company in the circumstances alleged and proved in this case is based upon the *required use* of the ballast for the purpose of boarding moving trains, not upon any structural insufficiency from an engineering standpoint or upon any failure to maintain the roadbed in accordance with standard maintenance practice. It was the failure of the railroad company to furnish a reasonably safe place for boarding the moving train, or stated affirmatively, its requirement that plaintiff board the moving train by means of a footing that was insecure and dangerous for that purpose that made the railroad company liable for petitioner's injuries. The ballast and other parts of the roadbed may have been the most modern and the best for the passage of trains over the tracks at that place and yet may have been unsafe and dangerous for use by the trainmen whose duties required that they use the ballast, which was coarse and loose and insecurely packed, as a ramp and footing for boarding the movings trains. Was not the jury warranted in so finding?

The holding by the court below that "This was essentially an engineering question" and that "the courts generally trust to experts in that line for an answer" to such questions is based upon the statement to that effect by the Supreme Court of Vermont in *Bailey* v. *Central Vermont Ry.* 118 Vt. 8, 28 A. 2d. 639, 643, which in turn is based upon *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513, cited by the Supreme Court of Vermont. But the decision by the Supreme Court of Vermont in the *Bailey* case was reversed by this court in 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 and the decision in *Toledo S. L. & W. R. Co.* v. *Allen* was

expressly repudiated by this Court in *Tiller* v. *Atlantic Coast Line R. Co.* 318 U.S. 54, 66, 63 S. Ct. 444, 450, 87 L. Ed. 610, 143 A.L.R. 967.

(b) The federal rights of employees under F.E.L.A. "cannot be defeated by the forms of local practice." (*Brown* v. *Western Railway of Alabama, supra*) and a statement of a claim thereunder must be held good if the allegations:

> "are sufficient to permit introduction of evidence from which a jury might infer that petitioner's injuries were due to the railroad's negligence in failing to supply a reasonably safe place to work."
>
> *Brown* v. *Western Railway of Alabama,* 338 U.S. 294, 70 S. Ct. 105, 107, 94 L. Ed.———.

The allegations of negligence in the petitioner's declaration:

> "the ground along which plaintiff was obliged to run to overtake, and board said caboose was approximately 30 inches below the level of the track so that it was necessary in boarding the caboose to step upon the ballast upon which the track was constructed and at that place the ballast was coarse and loose and insecurely packed and did not afford plaintiff a secure footing for boarding the said cabose." (R. 1).

were sufficient to meet the test. The roadbed may have been, and probably was, quite sufficient for the purpose of carrying the respondent's trains and passengers safely and comfortably over the place where petitioner was injured.

But that was not the only use to which the roadbed was put. For the duties of petitioner's employment required that he alight at that place and run after and overtake and board the moving train after having thrown the switch and checked the points and locked the switch. It was necessary for petitioner to use the ballast as a footing for boarding the caboose and it did not afford him a secure footing for that purpose. It is obvious that the "place" where plaintiff was obliged to board the moving caboose was not safe but was dangerous and unreasonably so. At least the jury might and did so infer.

(c) This court has repeatedly held that the jury is the appropriate tribunal to determine questions of negligence under the Federal Employers' Liablilty Act, and that the right to trial by jury:

> "Is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. . . . . To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."
>
> *Bailey* v. *Central Vermont Ry.*
> 319 U.S. 350, 354, 63 S. Ct.
> 1062, 1064, 87 L. Ed. 1444.

It was in the *Bailey* case that this court said:

> "That duty of the carrier is a 'continuing one' . . . . . from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.
>
> "The nature of the task which Bailey undertook,

"the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the grounds, the fact that the car could have been opened or unloaded near the bridge on level ground-- all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (Tiller v. Atlantic Coast Line R. Co.,supra.) as well as issues in involving controverted evidence, Jones v. East Tennessee, V. & G. R. Co., 128 U.S."

Bailey v. *Central Vermont Ry.*
319 U.S. 350, 63 S. Ct. 1062,
1064, 87 L. Ed. 1444.

(d) The decision of the Florida Court constitutes a reversion to the principles upon which the courts, through "a great maze of restrictive interpretations", denied recovery in many similar cases, before the 1939 amendment and this court's repudiation of those principles in *Tiller* v. *Atlantic Coast Line R. Co.* 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967.

In the court below the respondent relied upon *Toledo St. L. & W. R. Co.* v. *Allen*, 276 U.S. 165, 48 S. Ct. 215, 72 L. Ed. 513 and *Delaware L. & W. R. Co.* v. *Koske*, 279 U.S. 7, 49 S. Ct. 202, 73 L. Ed. 578.

Toledo St. L. & W. R. Co. v. *Allen* announced that:

> "carriers like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries."
>
> *Toledo St. L. & W. R. Co.* v. *Allen,* 276 U.S. 165, 170, 48 S. Ct. 215, 217, 72 L. Ed. 513.

And *Delaware L. & W. R. Co.* v. *Koske,* applied the quoted language to an open drain maintained between tracks in the railroad's yard.

It was this doctrine that was echoed and applied by the court below when it said: "this was essentially an engineering question and the courts generally trust to experts in that line for an answer to the question". (R. 62,63).

But the doctrine of the *Allen* and *Koske* cases was expressly repudiated in the first *Tiller* case; it was a part of the "maze of law which Congress swept into discard with adoption of the 1939 amendment to the Employers' Liability Act". See *Tiller* v. *Atlantic Coast Line R. Co.* 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967, notes 24-26 and 30 and related text.

The respondent also relied upon and the Supreme Court of Florida cited the recent decision by the United States Court of Appeals for the Fifth Circuit in *Atlantic Coast Line R. Co.* v. *Coleman,* 182 Fed. 2d 712, denying recovery to a

section foreman who was injured while engaged in repairing a bridge. It is noted that there the injured employee was engaged in *repairing* the facility while here the petitioner had no responsibility for the condition of the roadbed he was using when injured. The correctness of the *Coleman* decision is doubtful. Its weight is lessened by an able dissent by Circuit Judge Russell whose concurrence with the trial judge left the judicial count 2 to 2. In no event could that decision be considered as detracting from the controlling effect of this Court's decisions in *Bailey* v. *Central Vermont Ry.* 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; and *Pauly* v.*McCarthy*, 330 U.S. 802, 67 S. Ct. 962, 91 L. Ed. 1261.

CONCLUSION

It is clear that the decision below constitutes a departure from the course of decisions by this court under the 1939 Amendment. If permitted to stand, the Florida Court's decision will lead to other serious departures and it is important that it be corrected. But the controlling principles are so clear and so well established that its error might appropriately be corrected by summary reversal upon a memorandum opinion.[3]

For the foregoing reasons, petitioner prays that this court will grant this petition for a writ of certiorari and (a) summarily reverse the judgment of the Supreme Court of Florida, or, in the alternative, (b) transfer this case to the

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3. This seems to have been the procedure followed in **Cogswell** v. **Chicago & E. I. R. Co.** 328 U.S. 820, 66 S. Ct. 1122, 90 L. Ed. 1601 and **Eubanks** v.**Thompson**, 334 U.S. 854, 68 S. Ct.1528, 92 L. Ed. 1776. See also: **Keeton** v. **Thompson**, 326 U.S. 689, 66 S Ct. 135, 90 L. Ed. 405, **Pauly** v.**McCarthy**, 330 U.S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 and **Penn** v. **Chicago & N. W. R. Co.** 335 U.S. 849, 69 S. Ct. 79, 93 L. Ed. 398. All of the foregoing were F.E.L.A. cases.

court's summary docket for oral argument and disposition in due course.

Respectfully submitted,

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APPENDIX "A"

The pertinent parts of the Federal Employers' Liability Act (45 U.S. Code, Sections 51 et seq) are as follows:

> "Section 51. Every common carrier by railroad while engaged in commerce between any of the several States . . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . . for such injury . . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

> "Section 53. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee . . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, ..."

> "Section 54. That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to . . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . . resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . . . "

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BRIEF OF RESPONDENT

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

STATEMENT OF THE MATTER INVOLVED

The statements in petitioner's application for writ of certiorari with regard to jurisdiction and the statutes involved are correct.

The statement of the case in the petition is incomplete. For the convenience of the Court the following is a more complete statement.

Petitioner, an experienced railroad flagman, injured his knee when he fell on the sloping side of respondent's rock ballasted railroad track (R 32 - 33). Petitioner was about to board the caboose of a slow moving freight train when he fell on the rock ballast as he was attempting to catch onto the grab iron near the rear platform of the caboose (R. 8; R.32). Petitioner was familiar with the rock ballast and the switch point at the place where he was injured, as he had been there before with the same conductor. (R. 27). The accident happened in the daytime on the respondent's main-line track 31 miles south of Wildwood, Florida (R. 6-7; R. 33).

Shortly before the accident happened petitioner and the conductor were riding on the rear platform of the caboose of a southbound freight train which was pulling out of a side track going onto the mainline track after having stopped to wait for a northbound passenger train to pass on the mainline (R. 7; R.32). Petition got off the caboose onto the ground as the rear of the train passed over a switch connecting the main-line with the side track (R. 32). Petitioner then threw the switch and was running south along the west side of the rock ballasted mainline track to catch the rear of the caboose, which was then about 30 feet from the switch, when his feet slipped on the ballast as he was about to catch on the caboose (R. 8). Petitioner, in attempting to get on the rear platform of the moving caboose, missed the grab iron on the side of the caboose as he was running to catch the train and fell on the rock ballast (R. 19 - 20; R. 32 - 34). The conductor was standing on the rear platform of the caboose and saw the petitioner fall and stopped the train immediately, as it was then moving between two and four miles per hour (R. 8).

The ballast between Wildwood and Miami, Florida, is coral rock and slopes at a twenty-five to thirty degree angle from the end of the ties to the ground along side of the ballast (R. 34).

There was no negligence alleged in the declaration as to the operation of the train, but the petitioner's declaration was framed on the theory that respondent had failed to furnish petitioner a reasonable safe place in which to perform his duties. (R. 1 - 2).

Respondent pleaded not guilty and at the trial it was admitted that the train was operated without negligence (R. 3; R. 27). The only witness for the petitioner, other than his doctor, was the conductor (R. 5 - 31). The conductor testified that petitioner hadn't got hold of the grab iron but was off balance when he fell on the ballast (R. 19). The conductor also testified that ballast will not roll unless there is something on it to make it roll (R. 20). Conductor Dougherty also testified that he had measured with a tape measure from the end of the tie to the edge of the ballast about 30 feet south of the switch point, and the distance was 53 inches (R. 24 - 25). There was no testimony that there was anything unusual about the 53 inch measurement. The conductor also testified that he estimated the ground where the rock ballast ended along side of the track was 30 inches below the level of the track, although he also stated that it may have been 24 or 25 inches (R. 23). There was no testimony offered that there was anything unusual if the ground was 30 inches below the level of the track.

At the close of petitioner's testimony respondent made a motion for a directed verdict (R. 44 - 47). The respondent argued that there was no negligence alleged or proven, and that there was no evidence which would sustain a jury ver-

dict in favor of the petitioner (R. 44 - 47). There was no testimony introduced by the petitioner to show that respondent had failed to furnish petitioner a reasonably safe place to work, and there was no evidence to show negligent maintenance of the railroad track. There was nothing alleged in the declaration, nor was there any evidence introduced, to show that the rock ballasted track was any different where the accident occured than any other part of the respondent's railroad system (R. 1 - 2). The evidence for the petitioner showed the ballast was the same where the accident occurred as on practically all of the railroad south of Wildwood (R. 33). The evidence was undisputed as to the manner in which the petitioner got hurt. Respondent's motion for directed verdict was denied by the Court (R. 46).

The respondent then announced to the Court that it had no testimony to offer and renewed its motion for directed verdict (R. 47 - 49). This motion was also denied by the Court (R. 49).

The case was argued before the jury by counsel, instructions were given by the Court and the jury retired to the jury room and after deliberating returned a verdict for the petitioner in the sum of $3,500.00 (R. 49 - 56).

Respondent filed a motion for new trial which was denied and respondent appealed (R. 56 - 57).

Upon appeal to the Supreme Court of Florida the judgment was reversed and the trial Court directed to enter a judgment for the respondent (R. 60 - 68).

QUESTION PRESENTED

Respondent cannot admit that petitioner has correctly stated the question presented. Petitioner states the question presented as follows:

> "Whether the allegations and proof of respondent's negligence in failing to prrovide petitioner a reasonably safe place in which to perform his duties as flagman were sufficient to support the jury's verdict for petitioner".

The question as thus stated assumes the correctness of petitioner's position on the very points here in controversy. It is admitted that if there were any "allegations and proof of respondent's negligence" that proximately contributed to petitioner's injuries, that they would be sufficient to support the jury's verdict for petitioner. It is respondent's position that there was no negligence charged or proven against respondent. The question or questions presented, therefore, is not "whether the allegations and proof of respondent's negligence" were sufficient but whether or not there was any negligence alleged or proven. It is also submitted that the duty of a carrier is not to furnish its employees with a reasonably safe place to work but to *use reasonable care* to furnish its employees with a reasonably safe place to work.

Therefore, the question presented might be fairly stated as follows:

> "Were there any facts alleged or proven from which it might be found or reasonably inferred that the respondent was guilty of negligence in failing to use reasonable care to provide petitioner with a

reasonably safe place in which to perform his duties?"

ARGUMENT

Fundamentally, the reasons for granting the writ as advanced by the petitioner set forth two propositions. Petitioner apparently contends (1) that every case under the Federal Employers' Liability Act should be submitted to a jury and (2) that the sufficiency of a complaint to state a cause of action under the Federal Employer's Liability Act can no longer be tested by a demurrer or other pleading.

As authority for the first proposition, petitioner cites the cases of *Bailey* v. *Central Vermont Railway,* 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, and *Pauly v. McCarthy,* 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261. Other authorities are cited for the general proposition that "the decision of the Court below is not in accord with the long line of decisions by this Court establishing that such issues are for the jury in these Federal Employers' Liability cases". The *Pauly* case is a per curiam reversal based on the *Bailey* case. Petitioner relies mainly on the *Bailey* case. The *Bailey* case held:

> "There was in our view sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work".

The *Bailey* case cites as authority the case of *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444. The *Tiller* case held:

> "Many years ago this Court said of the problems of

> negligence 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact why it should not decide such questions as these as well as others'. *Jones* v. *Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 32 L. Ed. 478, 479. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences', the case should go to the jury".

There is nothing new or startling about the law laid down in the *Bailey* case. Respondent admits its correctness and soundness. Respondent does not consider it to be in point here. More clearly in line with the answer to the question presented is the sound logic of this Court in the later case of *Brady* v. *Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed 239. This Court there stated:

> "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. *Western & A. R. Co.* v. *Hughes*, 278 US 496, 73 L ed 473, 49 S Ct 231, supra; *Baltimore & O. R. Co.* v. *Groeger*, 266 US 521, 524, 69 L ed 419, 45 S Ct 169. Cf. *Gunning* v. *Cooley*, 281 US 90, 94, 74 L ed 720, 724, 50 S Ct 231; *Marion County* v. *Clark*, 94 US 278, 284, 24 L ed 59, 61. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial

> the result is saved from the mischance of speculation over the legally unfound claims. *Galloway* v. *United States,* 319 US 372, 87 L ed 1458, 63 S Ct 1077; *Pence* v. *United States,* 316 US 332, 86 L ed 1510, 62 S Ct 1080; *Baltimore & O. R. Co.* v. *Groeger,,* 266 US 521, note 1, 69 L ed 419, note 1, 45 S Ct 169; *Anderson* v. *Smith,* 226 US 439, 57 L ed 289, 33 S Ct 176; *Coughran* v. *Bigelow,* 164 US 301, 307, 41 L ed 442, 444, 17 S Ct 117; *Gunning* v. *Colley,* 281 US 90, 93, note, 74 L ed 720, 723, note, 50 S Ct 231; *Seaboard Air Line R. Co.* v. *Padgett,* 236 US 668, 673, 59 L Ed 777, 781, 35 S Ct 481; *Parks* v. *Ross.* 11 How (US) 362, 373, 13 L ed 730, 735. See 9 Wigmore on Evidence, 3d ed 1940, §§ 2494 et seq."

See also the case of *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572, where this Court stated:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 USCA Sec. 51, 10A FCA title 45, Sec. 51; *Brady* v. *Southern R. Co.* 320 US 476, 484, 88 L ed 239, 245, 64 S Ct 232. Whether those standards are satisfied is a federal question, the rights created being federal rights. *Brady* v. *Southern R. Co.* (US) supra; *Bailey* v. *Central Vermont R. Co.* 319 US 350, 87 L ed 1444, 63 S Ct 1062".

Respondent submits that there are many cases arising under the Federal Employers' Liability Act where the evidence may be insufficient to submit to the jury or uncontroverted and, therefore, a question of law for the Court.

The petitioner relies upon the case of *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 94, as authority for the proposition that "the federal rights of employees under F. E. L. A. cannot be defeated by the forms of local practice". Respondent agrees that the federal rights of an employee cannot be taken from him under the guise of local practices. Respondent does submitt that the sufficiency of a declaration or complaint to state a cause of action under the Federal Employers' Liability Act may still be tested by demurrer. Last year this Court upheld a judgment of the Supreme Court of the State of Alabama affirming a judgment of the Circuit Court, Jefferson County not-suiting the plaintiff, the administratrix of the estate of her deceased husband, in an action under the Federal Employers' Liability Act to recover damages for his death. This case is that of *Mrs Marie Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, 69 S. Ct. 507, 93 L. Ed. 618. This Court held in a per curiam opinion:

> "The petitioner brought this suit under the Federal Employers' Liability Act in an Alabama state court. As permitted by the practice in that state, all the facts which the petitioner expected to prove to establish her cause of action were set forth in the complaint so that any objections to a verdict in her favor based on evidence of those facts could be disposed of prior to trial. The respondent demurred to the complaint on the ground that the facts as thus set forth did not constitute a cause of action. The demurrer was sustained by the trial court and its action was affirmed by the Supreme

Court of Alabama. We granted certiorari.

"It appears from the complaint that the petitioner's husband was a brakeman whose duties customarily required him to cross between cars on moving freight trains. On one such crossing he fell and was killed. This crossing occurred as part of a required journey from the caboose to a car from which a signal was to be given. The signal ordinarily would have been given from the sixth car from the caboose. The complaint charged, however, that because the railroad had negligently allowed canes to grow alongside the roadbed the deceased could not safely signal from the sixth car and so had to cross to the seventh in order to give the required signal. On this additional crossing he was killed. The complaint also charged that the deceased would not have had to make this particular journey at all if the railroad had provided a competent assistant brakeman. *Neither the journey nor the crossing on which the accident occurred was alleged to be any more hazardous than that usually undertaken by railroad brakemen.* (Italics ours)

"The Alabama Supreme Court conceded that the complaint adequately charged negligence in the failure to remove the canes and in the failure to provide a competent fellow servant. It held, however, that the facts alleged did not show that the accident resulted proximately, in whole or in part, from that negligence. We cannot say that the Supreme Court of Alabama erred.
"Affirmed".

There is no statute nor decision requiring that all cases under the Federal Employers' Liability Act must be sub-

mitted to the jury for a determination of whether or not the railroad has failed to use reasonable care to furnish its employee a reasonably safe place to work.

This Court has held that the sufficiency of a complaint to state a cause of action under the Federal Employers' Liability Act may be tested by demurrer and that all such suits need not be determined by jury action. The action of the Supreme Court of Florida in reversing the trial Court and in directing that judgment be entered for the respondent, 46 Sou. (2d) 485, will now be considered. The concluding statement of that opinion is as follows:

> "The evidence fails to show that defendant committed any act that it ought not to have committed or omitted to perform any duty required of it".

As the evidence conformed to the pleading, the sufficiency of the declaration will necessarily be determined by deciding if there was any negligence proven.

Under the Federal Employers' Liability Act the railroad is not a guarantor nor an insurer of the safety of its employees. The Federal Employers' Liability Act is not a Workmen's Compensation Act. It does not impose liability without fault. See *Union P. R. Co.* v. *O'Brien*, 161 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 766, where it is said:

> "The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumlated by its embankments and excavations * * *".

See also *Reese* v. *Philadelphia & R. R. Co.*, 239 U. S. 463, 36 S. Ct. 134, 60 L. Ed. 384, where this Court said:

> "The rule is well settled that a railroad company is not to be held as guarantying or warranting absolute safety to its employees under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures. A failure to exercise such care constitutes negligence".

The decisions from the Supreme Court of the United States are legion that the Federal Employers' Liability Act does not make the employer the insurer of the safety of his employees while on duty, but the basis of his liability is negligence which must be in whole or in part the cause of the injury. One of the latest cases to reiterate this rule is the case of *Ellis* v. *Union P. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572. This Court there stated:

> "The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury. 45 USCA Sec. 51, 10 A FCA title 45, Sec. 51; *Brady* v. *Southern R. Co.* 320 US 476, 484, 88 L ed 239, 245, 64 S Ct 232".

A previous case is that of *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520. Mr. Justice Murphy, writing for this Court, said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to

> prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 US 54, 67, 87 L ed 610, 617, 63 S Ct 444, 143 ALR 967".

See also *Brady* v. *Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239, where this Court said:

> "Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. *Tiller* v. *Atlantic Coast Line R. Co.* 318 US 54, 67, 87 L ed 610, 617, 63 S Ct 444, 143 ALR 967".

See also the case of *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 458, 52 S. Ct. 229, 76 L. Ed. 1098. Mr. Justice Stone, in delivering the opinion of this Court, stated:

> "Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act".

The case of *Atchison, T. & F. R. Co.* v. *Saxon*, 284 U. S. 458, 52 S. Ct. 229, 76 L. Ed. 397, is likewise in point. Mr. Justice McReynolds, in delivering the opinion of this Court, stated:

> "As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. *New York C. R. Co.* v. *Ambrose*, 280 U. S. 486, 74 L. ed. 562, 50 S. Ct. 198; *Atchison T. & S. F. R. Co.* v. *Toops*, 281 U. S. 354, 74 L. ed. 899, 50 S. Ct. 281"

In the case of *Chesapeake & O. R. Co.* v. *Stapleton*, 279 U. S. 587, 49 S. Ct. 442, 73 L. Ed. 861, Mr. Chief Justice Taft, in delivering the opinion of this Court, stated:

> "The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this act * * *".

Petitioner contends that the doctrine of law laid down by these decisions are "swept into discard with the adoption of the 1939 amendment to the Federal Employers' Liability Act". Petitioner cites the case of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, as authority. The 1939 amendment wiped out every vestige of the doctrine of assumption of risk. This Court said in that case:

> "It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. The result is an act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed".

Negligence must still be proven in order for an employee to recover under the Federal Employers' Liability Act. The 1939 amendment did not change that rule. See *Ellis* v. *Union P. R. Co.*, *supra*, and *Brady* v. *Southern R. Co.*, *supra*.

The rule to be gathered from the decisions of this Court is that in order for a plaintiff to recover under the Federal Employers' Liability Act he must prove that the railroad

failed to use reasonable care to furnish him a reasonably safe place in which to perform his duties. This can only be done by showing affirmatively the negligent act or omission which the railroad committed or failed to do. Then that negligence must be shown to be the proximate cause, in whole or in part, of the injuries which plaintiff sustained.

It is to be noted that petitioner did not allege or attempt to prove that at the place petitioner was injured that the ballast was any different than anywhere else on respondent's railroad.

How then, and in what manner, do the facts proven show any actionable negligence on the part of the respondent, Seaboard Air Line Railroad Company? The only two facts proven are (1) that the ground was approximately 30 inches below the level of the track and (2) that it was necessary for the petitioner to step upon the ballast in order to board the train and that the ballast was coarse and loose and insecurely packed. Do these facts constitute negligence?

Petitioner relies upon the case of *Brown* v. *Western Railway of Alabama, supra.* In that case this Court held that a cause of action under the Federal Employers' Liability Act was stated by a complaint which alleged that the plaintiff railroad employee was injured while in the performance of his duties when he stepped on a large clinker lying alongside a track and that the defendant, well knowing that this was dangerous to workers, had negligently permitted clinkers to collect alongside the track. In addition to the allegation with regard to the clinker, the complaint alleged:

> "• • • that respondent had allowed "clinkers" and other debris "to collect in said yards along the side of the tracks"; that such debris made the "yards unsafe"; that respondent thus failed to supply him

> a reasonably safe place to work, but directed him to work in said yards "under the conditions above described"; that it was necessary for petitioner "to cross over all such material and debris"; that in performing his duties he "ran around" an engine and "stepped on a large clinker lying beside the tracks as aforesaid which caused petitioner to fall and be injured"; that petitioner's injuries were "directly and proximately caused in whole or in part by the negligence of the defendant . . . (a) In failing to furnish plaintiff with a reasonably safe place to work as herein alleged. (b) In leaving clinkers . . . and other debris along the side of track in its yards as aforesaid, well knowing that said yards in such condition were dangerous for use by brakemen working therein and that petitioner would have to perform his duties with said yards in such condition".

The Court held that the complaint stated a cause of action. The distinction, however, is at once apparent. The allegations of fact upon which the negligence charged against the railroad in the *Brown* case are entirely clear. Those allegations charged the defendant railroad with negligently permitting large clinkers and other debris to collect along side the track. These charges, if proven, would unquestionably show a violation by the railroad of its duty to use reasonable care to furnish *Brown* with a reasonably safe place to work. The clinkers and other debris alleged to have been upon the right of way of the *Western Railway of Alabama* constituted no part of the right of way, but were foreign matter which, it was charged, that the defendant railroad negligently permitted to accumulate. The charge made against the railroad in the case at bar is simply that the railroad constructed a road bed and that in such construction so laid the ballast that it was approximately 30 inches from the ground to the

level of the track, by reason whereof it became necessary for petitioner to step upon the ballast in order to board the moving caboose. There is no allegation or proof that such construction or maintenance was done negligently or not in accordance with sound engineering principals. In the absence of affirmative proof to the contrary it must be assumed that construction and maintenance of the ballast in that manner was an essential and proper part of the track structure and had been constructed pursuant to sound engineering principles.

In Delaware, *Lackawanna & Western R. Co.* v. *Koske*, 279 U. S. 7, 72 L. Ed. 578, 49 S. Ct. 202, an employee sued the railroad for injuries sustained by falling into a ditch in its yards between the tracks while alighting from an engine in the dark. This Court said:

> "The Federal Employers' Liability Act permits recovery upon the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence. The burden was on plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured, and that in whole or in part his injuries resulted proximately therefrom * * *".

The coral rock ballasted railroad track at the place where petitioner was injured was in the same condition as the rest of the track from Wildwood to Miami (R. 33).

Neither petitioner nor his witness, the conductor, testified to any negligence in the maintenance of the track and road bed. They said that ballast would slip or roll under a person's

feet and that it was necessary to step on the ballast to board the caboose.

The ballast was installed and maintained by the railroad. There was no proof that it was negligently laid or maintained. Neither a Court nor jury should be allowed to prescribe engineering standards for a railroad in the maintenance of its track and road bed.

In Delaware, *Lackawanna & Western R. Co.* v. *Koske*, *supra*, this Court said, in holding that the evidence did not support a finding of negligence against the railroad:

> "Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care having regard to the circumstances. *Patton* v. *Texas & P. R. Co.* 179 U. S. 658, 664, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275. There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of the railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect to such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries. *Toledo, St. L. & W. R.*

Co. v. *Allen*, 276 U. S. 165, 170, 72 L. ed. 513, 516, 48 Sup. Ct. Rep. 215.

"The evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff in respect of the method employed or the condition of the drain at the time and place in question. *Nelson* v. *Southern R. Co.* 246 U. S. 253, 62 L. ed. 699, 38 Sup. Ct. Rep. 233; *Missouri P. R. Co.* v. *Aeby*, 275 U. S. 426, 72 L. ed. 351, 48 Sup. Ct. Rep. 177".

The declaration charged respondent with failure to furnish the petitioner a reasonably safe place to work and further charged that the ground along which petitioner was required to run to overtake and board the caboose was approximately 30 inches below the level of the track, so that it was necessary in boarding the caboose to step upon the ballast. The declaration also alleged that the ballast was coarse and loose and insecurely packed. Of necessity ballast must be coarse and loose and insecurely packed or it would not be appropriate for the purpose for which it was intended. Ballast is laid and maintained or the purpose of stabilizing the track and providing proper drainage.

Petitioner was familiar with the switch point and the ballast and track at the place where he was injured, because he had previously worked there. Petitioner knew that it was necessary after the switch had been thrown to run on the ground along side the ballast and catch onto the caboose of the moving train. The evidence showed that this was the customary and usual method employed after a flagman had thrown a switch.

There is not one scintilla of evidence to show that the rail-

road track, ballast or road bed was negligently maintained. There was no evidence introduced to show how or in what manner the railroad company was negligent in any way in the maintenance of its track and ballast. How can it be said that the petitioner has affirmatively proven negligence when it is admitted the train was operated without negligence, and no negligence has been proven in the maintenance of the track and ballast?

In Toledo, *St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 72 L. Ed. 513, 48 S. Ct. 215, this Court said:

> "The rule of law which holds the employer to ordinary care to povide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189, 194, 30 L. ed. 1114, 1116, 7 Sup. Ct. Rep. 1166, *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478, 482, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed

> him in respect of the space between the tracks. *Missouri P. R. Co.* v. *Aeby, supra.* The court erred in submitting that question to the jury".

Petitioner contends that the doctrine of the *Allen* and *Koske* cases were expressly repudiated in the first *Tiller* case. To the extent that the *Allen* and *Koske* cases dealt with the doctrine of assumption of risk they were superceded by the 1939 amendment and the *Tiller* case. We submit that neither the amendment nor the *Tiller* case alters the rules laid down with regard to the statements that juries are not permitted to infer negligence when the track is constructed and maintained in accordance with sound engineering principles.

The entire record is bare of any evidence from which either a Court or a jury could possibly draw an inference of negligence on the part of the railroad. As was said in *Gulf, M. & N. R. Co.* v. *Wells,* 275 U. S. 455, 72 L. Ed. 370, 48 Sup. Ct. Rep. 151, where plaintiff, a railroad brakeman, who sued for personal injuries under the Federal Employers' Liability Act, claiming that as he started to get on the caboose of a freight train he stepped on a big piece of coal, his foot turned and he went down and the engine gave an unusual jerk which threw him on the ground, injuring his knee cap:

> "In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the railway company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough. *Patton* v. *Texas & P. R. Co.* 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275; *Chicago, M. & St. P. R.*

> *Co.* v. *Coogan, supra,* 478 (70 L. ed. 1045, 46 Sup. Ct. Rep. 564)".

Here the evidence is undisputed and there is no support in the record for any finding or possible inference of negligence, other than speculation or conjecture.

In *Eckenrode* v. *Pennsylvania R. Co.,* 335 U. S. 329, 93 L. Ed. 64, 69 S. Ct. 91, this Court affirmed the action of the Federal District Court and the Circuit Court of Appeals in holding there was no evidence of negligence against the railroad under the Federal Employers' Liability Act.

In that case a railroad brakeman was killed by a train and his widow contended that the engineer was negligent in not keeping a lookout. This Court said:

> "There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her. Accordingly, the judgment is affirmed".

This Court stated in the case of *Eckenrode* v. *Pennsylvania, supra*:

> "Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent (railroad) which contributed, in

whole or in part, to Eckenrode's death?"

Pursuant to the same logic, it may be asked in this case: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to petitioner's injuries?

The evidence is uncontroverted. The respondent offered no testimony. The evidence reveals that the track was 24 - 25 inches above the level of the ground. That it was 53 inches from the track to the berm along side the ballast. That the slope of the ballast was about 25 - 30 degree angle.

There is no dispute as to how or in what manner petitioner sustained his injury. The only question to be now considered is where was the negligence of the railroad which contributed, in whole or in part, to petitioner's injuries?

Is it negligence to ballast a track with coral rock? There is no indication in the record that it is.

Is it negligence to maintain a railroad track 24 - 25 inches above the level of the ground? There is no indication in the record that it is.

Is it negligence to have the ballast slope at a 25 - 30 degree angle? There is no indication in the record that it is.

Is it negligence to ballast a railroad track with rock which will roll when stepped upon? The record shows that all ballast will tend to roll when stepped upon.

If the respondent was guilty of negligence there must have been something it could have done that it didn't do, or did

something it shouldn't have done.

The railroad is not liable to petitioner for his injuries if there was no negligence in the maintenance of the track. This Court said, in the case of *Delaware*, etc. v. *Koske, supra*s

> "The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence".

The law is well settled that Courts will not set up engineering standards for a railroad to follow in constructing and maintaining its road bed, track and ballast, nor will the Courts allow juries to say how a railroad track should be constructed and maintained.

Here there is not one scintilla of evidence to show how or in what manner the railroad was negligent in the maintenance of its track and ballast.

CONCLUSION

Under the Federal Employers' Liability Act, the railroad is not a guarantor nor an insurer of the safety of its employees. The basis of the railroad's liability is its negligence, not the fact that injuries occur.

In order for petitioner to recover in this case, he must allege and prove that the railroad negligently failed to use reasonable care to furnish him a reasonably safe place in which to perform his duties. This can only be done by showing affirmatively the negligent act or omission which caused said place to be not reasonably safe. Then that negligence must be shown to be the proximate cause, in whole or in part, of the injuries which petitioner sustained.

The sufficiency of a declaration to state a cause of action under the Federal Employers' Liability Act may still be tested by demurrer. Where the declaration fails to allege any negligence or fails to show how and in what manner the negligence alleged was the proximate cause, in whole or in part, of the injuries received, a demurrer should be sustained.

The theory of the declaration in this action is that the respondent carelessly and negligently failed to furnish the petitioner a reasonable safe place to work. The place was the track and road bed at a point about 30 feet south of the south switch at Bryan, Florida.

What fact has petitioner alleged or proven which constituted negligence? We submit there is none. The petitioner has done no more than allege and prove th manner in which the right of way was constructed. It is established law that a carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negligence.

It is not alleged nor proven that there was anything unusual about this point in the right of way. It is not alleged nor proven that the respondent failed to comply with any given standard of care for the safety of its employees. It is neither alleged nor proven that the respondent negligently did some act which rendered the premises unsafe. It is neither alleged nor proven that the respondent negligently failed to do any act which would have rendered the premises a safe place in which to work. The allegations and the proof offered in support thereof are merely descriptive of the locus. This, we respectfully submit, is not enough to state a cause of action nor to require the submission to the jury so that it could determine, ipso facto, the question of negligence.

If the allegations pleaded or the facts proven in this case

are sufficient to state or prove a cause of action, then merely the allegation and proof of the distance of the stirrup on a box car from the ground, or the distance apart of the rungs of the car ladders, or for that matter any other features of a railroad's mechanical devices or equipment, or of its track and road bed, is sufficient upon which the jury may decide the question of negligence. Such a doctrine could so permeate the entire operation and maintenance of railroads as to make the business a hodgepodge of the whims and caprices of various juries in all sections of our nation. Such a view would necessarily set up the juries' conception of what should be standard in place of the careful calculations and experience of engineers and other experts whose studied conclusions have been the standard heretofore prescribed and followed.

The petitioner is entitled to no presumption of negligence nor can the Court assume, or allow the jury to assume, any negligence merely upon proof of existing conditions. The negligence must be affirmatively shown and that negligence must be proven to be the proximate cause, in whole or in part, of the injuries sustained.

It is respectfully submitted that upon a careful consideration of the record it will be found that there is no evidence nor any inference which reasonably may be drawn from the evidence, when view in a light most favorable to the petitioner, which can sustain a recovery for the petitioner, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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